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IN THE

Supreme Court of The United States

October Term 1967

No. 1042

EDWARD LAMAR GAY,

Petitioner,

versus

CITY OF ORLANDO,

Respondent.

Petition for Writ of Certiorari to the
Supreme Court of the United States

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1967

No.

EDWARD LAMAR GAY,

Petitioner,

versus

CITY OF ORLANDO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, EDWARD LAMAR GAY, respectfully prays for a Writ of Certiorari to the Supreme Court of the United States in order to review a mandate and judgment of the District Court of Appeal of the State of Florida, Fourth District, affirming the appellate decision of the Circuit Court of the Ninth Judicial Circuit which in turn affirmed the conviction by the Municipal Court of the City of Orlando of the charge of driving on a public highway while under the influence of intoxicating liquors and sentencing him to a fine of $200.00 or sixty (60) days in jail.

OPINIONS

The trial court issued no formal opinion. The Circuit Court of the Ninth Judicial Circuit of Orange County, sitting as an appellate court issued a brief opinion wherein they merely affirmed the conviction of the appellant by the municipal court of the City of Orlando. The District Court of Appeal, Fourth District entered a written opinion on September 22, 1967, wherein they affirmed the appellate decision of the Circuit Court, thereby denying the Petition for Writ of Certiorari. That opinion can be found in the Southern Reporters, Volume 202, at page 896.

JURISDICTION

The judgment and mandate of the District Court of Appeal, Fourth District, State of Florida, was entered on September 22, 1967. A timely petition for rehearing was filed on October 6, 1967, and was denied on the 26th day of October, 1967. (Appendix A & B respectively.)

The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

Does the introduction into evidence of a person's refusal to take a physical test constitute a denial of the privilege against self-incrimination, especially where he has not been advised of his constitutional rights.

CONSTITUTIONAL PROVISIONS INVOLVED
FIFTH AMENDMENT

". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty . . . without due process of law. . ."

STATEMENT OF THE CASE

(a) How Federal Question was Presented.

During the course of the trial in the municipal court the prosecution during direct examination attempted to introduce into evidence the refusal of the defendant to make any statement to the arresting police officer. Counsel for the defendant objected on the basis that the admissibility of his testimony would violate the defendant's constitutional rights (Tr. 18-19).

Again later on in the testimony when the other arresting officer was testifying on direct examination the prosecution attempted to get into evidence the refusal of the defendant to perform a physical test. A similar objection was made by defense counsel at this time (Tr. 68-69).

Petitioner's brief in the Circuit Court of Orange County for the Ninth Judicial Circuit, State of Florida, asserted that the introduction of evidence of the refusal of the defendant to make any statement or the refusal of the defendant to take a physical test was a violation of the petitioner's rights, not only under the

State Constitution, but in addition under the Fifth Amendment of the Federal Constitution.

On petition for rehearing before the Circuit Court, petitioner again raised the unconstitutionality of the admissibility of these statements against the defendant.

On the petition for writ of certiorari to the District Court of Appeal, Fourth District of Florida, petitioner again raised the question of admissibility of the refusal of the defendant to take the physical tests and to make any statements as being violative of the Fifth Amendment of the United States Constitution.

In the opinion rendered by the District court of Appeal, they found that evidence of the refusal of a defendant to take a breathalyzer test did violate the defendant's constitutional privilege against self-incrimination. However, they refused to extend this reasoning to the refusal to take a physical test or refusal to make any statement whatsoever.

Petitioner filed a petition for rehearing in the District Court of Appeal pointing out the incongruity of that court in finding that the refusal to take a breathalyzer test was violative of the defendant's constitutional privilege, whereas the refusal to take a physical test or refusal to make any statement was not violative.

The District Court of Appeal, State of Florida, Fourth District is the highest court in the State of Florida in

which a review of the conviction of the defendant may be had.

(b) Your petitioner was convicted on the 8th day of March, 1966, of violating City of Orlando Municipal Ordinance 39.113, to-wit: Driving while under the influence of intoxicating beverages. During the course of testimony the arresting police officers involved in this case were allowed to testify concerning defendant's refusal to take physical tests and to cooperate in the administration of any tests and refusal to make any statements to the officers.

The court admitted this testimony over objection of counsel, said objections being predicated upon the fact that the refusal to take such tests and refusal to make any statement is not admissible into evidence in that it violated defendant's right against self-incrimination guaranteed by the Florida Constitution Declaration of Rights, and the Fifth Amendment of the United States Constitution. The admission of testimony by the City was calculated to impress upon the trier of the fact that the defendant was afraid to take any tests for fear that it would prove him intoxicated or for fear that he would not be able to pass the tests.

This factor was brought out when the police officer was asked whether or not they advised the defendant of his constitutional rights, to which question the police officer replied, "I told him that if he didn't think he was drunk he didn't have to take the test." (Tr. 15)

The court overruled the objection of counsel and admitted the testimony on the basis that the refusal to take a test, even though the defendant had been improperly advised of his rights to silence was not a violation of his constitutional privilege against self-incrimination as guaranteed by the Declaration of Rights of the Constitution of the State of Florida, and the Fifth Amendment of the United States Constitution.

The only witnesses produced by the City of Orlando to testify as to the intoxication of the defendant were the two police officers.

REASONS FOR GRANTING THE WRIT

DOES THE INTRODUCTION INTO EVIDENCE OF A PERSON'S REFUSAL TO TAKE A PHYSICAL TEST OR REFUSAL TO MAKE ANY STATEMENT CONSTITUTE A DENIAL OF THE PRIVILEGE AGAINST SELF-INCRIMINATION?

It seems fallacious to hold as the District Court in Florida has that the refusal to take a breathalyzer test is not admissible into evidence because it does violate the defendant's constitutional right against self-incrimination, and yet the court refused to find that the refusal to make any statement or the refusal to take a physical test likewise should not be admitted into evidence on the basis of being violative of the Fifth Amendment and of the United States Constitution.

Gay v. City of Orlando, 202 So.2d 896

The law throughout the country is in a relative state of flux on the admissibility of a refusal of a defendant to make any statements. Generally, the weight of authority has been to disallow the refusal of a defendant to make any statement in evidence on the basis of it being violative of the State Constitution[1], others on basis of statutes[2], others on the basis of both State Constitutions and statutes[3] and some on just basic rules of evidence[4] but there has *not* been a clear enunciation as to what effect the Fifth Amendment of the United States Constitution has upon this principle.

This Supreme Court has indicated in a footnote in the case of *Schmerber v. State of California,* 86 S. Ct. 1826, that the placing into evidence of the defendant's refusal to submit to a breathalyzer test would require a reversal, [see case @ page 1833, footnote 9]. This court reasoned that if the prosecution wished to compel persons to submit to tests that it may have to forego the testimonial products obtained during the submission of the tests.

It is clear that the careful and meticulous reasoning of enlightened men would require that if a defendant is entitled to refuse to answer any questions propounded to him by law enforcement agency on the grounds that it might tend to incriminate him then

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[1]*State v. McCarthy,* 104 N.W.2d 673.
[2]*People v. Stratton,* 143 N.Y.S.2d 362, aff. 1 N.Y.2d 664.
[3]*State v. Severson,* 75 N.W. 2d 316.
[4]*State v. Munroe,* 171 A.2d 419; *People v. Knutson,* 149 N.E.2d 461; *Engler v. State,* 316 P.2d 625 and *People v. Brown,* 228 N.E.2d 505.

his exercising his constitutional right and his refusal to waive that right should not be introduced into evidence against him.

The opinion of the Fourth District Court of Appeal of Florida in this case appears well reasoned on this point along with the many decisions in other states which have similarly followed this line of reasoning[5].

It only remains for the Supreme Court of the United States to clearly enunciate the rule of law applicable to the Fifth Amendment of the Federal Constitution in order to completely place this matter at rest.

CONCLUSION

For reasons stated herein petitioner respectfully urges that his petition for writ of certiorari should be granted.

Dated: January 19 1968

Respectfully submitted,

DOMINICK J. SALFI

DOMINICK J. SALFI
Attorney for Petitioner

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[5]*Duckworth v. State*, 309 P.2d 1103; *Saunders v. State*, 353 S.W. 2d 419; *State v. Clark*, 101 A.2d 868; *Gilley v. City of Anchorage*, 376 P.2d 484; *People v. Reeder*, 121 N.W.2d 840; *Hanlon v. Commissioner of Motor Vehicles*, 123 N.W.2d 136; *Cupp v. State*, 373 P.2d 260; *Stuart v. District of Columbia*, 157 A.2d 294.

CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing Petition for Certiorari have been served upon opposing counsel, by depositing the same, postage prepaid, in the United States mail, at Orlando, Florida, this 18 day of January, 1968.

DOMINICK J. SALFI

APPENDIX A

Opinion and Judgment

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1967

CASE NO. 1439

EDWARD LAMAR GAY,

Petitioner,

versus

THE CITY OF ORLANDO,
a municipal corporation,

Respondent.

Opinion filed September 22, 1967.

Petition for Writ of Certiorari to the Circuit Court for Orange County; W. A. Pattishall, Judge.

Dominick J. Salfi of Fishback Davis Dominick & Troutman, Orlando, for petitioner.

Joseph X. DuMond, Jr., Assistant City Attorney, Orlando, for respondent.

ANDREWS, Judge.

This case is here on a petition for a common law writ of certiorari. Petitioner asks us to review an appellate decision of the circuit court affirming his conviction in the municipal court of the City of Orlando.

Petitioner was arrested on a charge of driving while intoxicated and asked to take a breathalyzer test. He refused, and during the course of his trial the arresting officers testified as to his refusal. Counsel for petitioner objected to the introduction of this evidence and his objections were sustained. He argued, however, that this was insufficient because the judge was also the trier of facts and the damaging evidence had been heard. On appeal in the circuit court the judgment of conviction was affirmed without an opinion.

On amended motion for rehearing petitioner asserted that the appeal was improvidently lodged in the circuit court. He argued that the trial court's rulings on his objection, in effect, construed a controlling provision of the Florida or United States Constitution, to-wit, his privilege against self-incrimination. U.S. Const., amend. XIV & V; Fla. Const., Decl. of Rights § 12. This being so, appeal lay directly to the Supreme Court of Florida, Fla. Const., art. V, § 4(2), and petitioner urged that the appeal be transferred to the Supreme Court pursuant to F.A.R. 2.1(a)(5)(d).

The circuit court denied the amended motion for rehearing. Petitioner then filed his petition for cer-

tiorari contending two things: (1) that the circuit court was without jurisdiction to hear the appeal, and (2) that the circuit court's affirmance of the trial court ruling was incorrect and departed from the essential requirements of law.

Petitioner's first contention is without merit. Certiorari is the proper procedure to quash an appellate decision of a circuit court where the court has no jurisdiction. Robinson v. State, Fla. 1961, 132 So.2d 3. But in order to find that the circuit court was without jurisdiction, it must first appear that the trial court construed a controlling constitutional provision, thereby vesting exclusive appellate jurisdiction in the Supreme Court.

The Supreme Court has declared that, for direct appeal to lie, the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision. Page v. State, Fla. 1959, 113 So. 2d 557. This test has not been met here. The court in Page noted that application of facts in a case to a recognized clear-cut provision of a constitution does not amount to such an explanation or definition as will trigger the direct appeal provision. To invoke the right to a direct appeal it is necessary that the trial court do more than merely rule on a colorable assertion of constitutional rights. Roberts v. State, Fla. 1966, 181 So.2d 646. Were it otherwise, almost all criminal appeals would be to the Supreme Court. Many evidentiary rulings are made in the face of constitutional objections. Each ruling is made on a unique factual setting

and to that extent an existing doubt may be eliminated. But this is not sufficient. The Supreme Court has held that the mere fact that a constitutional right has been denied by a trial court, while error, does not give it jurisdiction. Actual construction or interpretation is required. Armstrong v. City of Tampa, Fla. 1958, 106 So.2d 407, 410.

In the instant case the trial court without elaboration applied constitutional standards to the facts before it. We conclude that the trial court did not construe a controlling constitutional provision. Consequently, the circuit court had jurisdiction to hear the appeal.

Petitioner's second contention presents an interesting problem. Petitioner was told he had a right not to take the breath analysis test. He chose not to and this fact was brought out at the trial. While it is true that the court sustained an objection to this testimony, petitioner nevertheless argues that the damage had been done and a mistrial should have been declared.

Petitioner's argument is that while a chemical test for intoxication is not violative of his privilege against self-incrimination, the state must forego any testimonial by-products which would fall within the privilege. Schmerber v. California, 1966, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908.

In Schmerber the United States Supreme Court held that the result of a blood test administered over the objections of a defendant was admissible in evidence and did not violate the defendant's self-incrimination

privilege. By analogy we hold that a properly administered breathalyzer test occupies the same status as the blood test in Schmerber. Evidence of petitioner's refusal to submit to the test, however, is a testimonial by-product that falls within the privilege.

In Schmerber the petitioner also refused a breathalyzer test and evidence of this was introduced. There the claim was that such evidence amounted to a comment on the invocation of the privilege and was inadmissible under Griffin v. California, 1965, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106, which held that a prosecutor could not comment on a defendant's failure to take the stand. The Schmerber court did not rule on this question, finding it to have been improperly presented. In a footnote, however, the court indicated that general Fifth Amendment principles would control rather than the precise holding of Griffin. Schmerber v. California, supra, n. 9.

This approach seems logical and supports our finding that results of a breathalyzer are not self-incriminating. The court appears to imply that because there is no privilege as to the breathalyzer, refusal to submit to the test is not an invocation of the privilege such as refusing to take the stand would be. It follows that comment or evidence of the refusal to take a breathalyzer or blood test does not fall within the rule in Griffin.

The admissibility of petitioner's refusal must be measured by general self-incrimination principles. It seems obvious that petitioner's statement was self-

incriminating and carried an inference of guilt. In fact it is difficult to see any relevancy in his statement other than providing such an inference. The Supreme Court noted that if an accused incriminates himself when faced with the prospect of taking a test, the testimony may be a product of compulsion and inadmissible. Schmerber v. California, supra, n. 9.

In the case before us petitioner was confronted with a choice of either voluntarily submitting to the test or refusing and thereby making a self-incriminating statement. While the results of a properly administered breathalyzer test are not within the privilege, self-incriminating testimonial by-products are. Schmerber v. California, supra.

Thus we agree with petitioner that evidence of his refusal to take a breathalyzer test is inadmissible. The trial court sustained his objections, however, and an examination of the record does not indicate that the substantial rights of the petitioner were so affected that a mistrial should have been declared. F.S.A. § 924.33.

The petition is denied.

COOPER, RICHARD H., Associate Judge, concurs.
CROSS, J., agrees to conclusion.

APPENDIX B

Order denying Petition for Rehearing

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1967

EDWARD LAMAR GAY,
Petitioner,

versus Case No. 1439

THE CITY OF ORLANDO, etc.,
Respondent.

October 26, 1967.

ORDERED that petitioner's petition for rehearing, filed October 9, 1967, is hereby denied.

A TRUE COPY
JULIA MADDOX, CLERK
Stephanie M. Petrulak
By: Chief Deputy Clerk

cc: Dominick J. Salfi, Esq.
Joseph X. DuMond, Jr., Esq.